Supreme Court, U.S.
FILED
MAR 28 1980

# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1525

BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER JR.: and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased

*Petitioners,*

v.

THE UNITED STATES OF AMERICA

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United

States Court of Appeals for the Tenth Circuit rendered in these proceedings on January 2, 1980.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, is reported at 611 F. 2d 1350 (10th Cir. 1980), a copy appears in Appendix A pp. A1-A14. The opinion of the United States District Court for the District of Utah, Northern Division, is reported a 469 F.Supp. 421 (N.D. Utah 1979), a copy of which is attached as Appendix B. pp. A15-A19.

## JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on January 2, 1980. This petition for certiorari was filed less than 90 days from the date of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 11.

## QUESTION PRESENTED

Petitioners, Byron H. Naisbitt, Laura W. Sword and Orren W. Walker, Jr. brought suit in the United States District Court for Utah under 28 U.S.C. § 2674 alleging negligence on behalf of the United States in failing to properly supervise enlisted personnel in the United States Air Force, William S. Pierre and Dale Andrews, persons under its control with known dangerous propensities and to prevent them from inflicting foreseeable harms.

1. Whether 28 U.S.C. § 2680(h) distinguishes between assaults and batteries committed by employees

of the United States and those committed by non-employees where both are proximately caused by the antecedent failure of the United States to supervise a person under its control with known dangerous propensities.

## STATUTORY PROVISIONS INVOLVED

*Title 28, United States Code, § 2674*:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

*Title 28, United States Code, § 2680(h)*:

"The provisions of this chapter . . . shall not apply to . . .

(h) Any claim arising out of assault, battery . . ."

## STATEMENT OF FACTS

The dismissal in the District Court was on a motion for summary judgment. The facts relevant to the issues presented by this petition were therefore uncontroverted. The facts presented to this Court, the District Court and the Tenth Circuit were drawn from the Amended Complaints.

Dale S. Pierre and Williams Andrews were both enlisted Airmen attached to the 1550th Unit of the Air Force at Hill Air Force Base in Ogden, Utah. Military and civilian command level authorities at Hill knew the following:

That Pierre and Andrews were held in great fear by their co-workers and considered capable of committing murder;

Their co-workers were advised never to remain or be caught alone in the building with Pierre or Andrews;

That Pierre was the prime suspect of the Ogden City Police Department and the Air Force Office of Special Investigations in a murder committed in Ogden, Utah during the Fall of 1973;

That Pierre had three pending criminal complaints charging him with automobile theft;

Andrews had been convicted of a felony prior to his enlistment in the Air Force;[1]

That Pierre and Andrews were both known to have violent and dangerous propensities;

That on three occasions Pierre's Sergeant had released him from duty and ordered him to report for psychological or psychiatric evaluation;

That each time Pierre failed to report for the evaluations and no effort was made to determine why he did not report;

That psychiatric evaluations would have shown both Pierre and Andrews to be psychopathic and capable of committing the heinous crimes which resulted in this action.

Though the information above was known to authities at Hill Air Force Base, no effort was made to determine the true nature and extent of Pierre and

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[1] The Armed Services of the United States are prevented by law from enlisting convicted felons. 10 U.S.C. § § 504, 8253.

Andrews' psychological problem and dangerous propensities. Further, no effort was made to restrict Pierre or Andrews to Hill Air Force Base to protect the public until such psychological evaluations could be made.

On April 22, 1974 Pierre and Andrews entered an Ogden, Utah business known as the Hi-Fi Shop carrying revolvers and liquid Drano. At the time, four of their victims were on the premises and the fifth entered shortly thereafter. All five persons were assaulted, threatened, physically and mentally abused in an inhuman fashion. Michelle Ansley and Carol Naisbitt were both raped and tortured. Cortney Naisbitt was froced to drink liquid Drano. Oren Walker, Jr. had a pen inserted and then kicked into his ear. Oren Walker, Jr. and Cortney Naisbitt survived. For these crimes, Pierre and Andrews have both been sentenced to death. (For a more gruesome description of what occurred see *State v. Pierre*, 572 P. 2d 1338 (Utah 1977), cert. denied 439 U.S. 883 (1978) a portion of which is attached as Appendix C pp. A20-A24.

On July 12, 1978 Amended Complaints in these five suits were filed in the United States District Court for the District of Utah, Central Division, asserting jurisdiction under 28 U.S.C. § 2674, alleging that the United States was negligent in failing to properly supervise persons under its control whom it knew or should have known possessed dangerous propensities. The petitioners sought approximately two million dollars in damages. The United States moved, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, to dismiss the consolidated actions for lack of jurisdiction.

The United States argued in support of its motion that these claims arose out of assaults and batteries and the court thus lacked jurisdiction under 28 U.S.C. § 2680(h) which exempts intentional torts from the Federal Tort Claims Act's general waiver of sovereign immunity. The district court granted the United States' motion holding that the allegations of negligence were "merely an alternative theory of liability". *Naisbitt v. United States*, 469 F. Supp. 421, 423 (N.D. Utah 1979); Appendix p. A18. The district court relied on what it considered to be the weight of modern authority citing *Collins v. United States*, 259 F. Supp. 363 (E.D. Pa. 1966), *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954), and *Pennington v. United States*, 406 F. Supp. 850 (E.D.N.Y. 1976).

A timely appeal was taken by the petitioners to the United States Court of Appeals for the Tenth Circuit and on January 2, 1980 that court affirmed the decision below. The Tenth Circuit based its decision on a presumed jurisdictional distinction between assaults committed subsequent to the negligence of the United States by employees and those committed by non-employees. The court reasoned that the government could be held liable when the eventual assault was committed by a non-employee but not when it was committed by an employee. The court stated "whether it is explicitely mentioned or not [in 28 U.S.C. § 2680(h)], effect is given to the employee distinction." 611 F. 2d at 1356, Appendix p. A11. For supporting authority the Tenth Circuit relied on the same cases cited by the district court; *viz. Collins, Panella* and *Pennington.*

The court stated its hoding in extremely broad terms:

"In any case in which the [government] employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government." 611 F. 2d at 1356, Appendix p. A14.

## REASON FOR GRANTING THE WRIT

### I

### THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS

The Tenth Circuit's holding, that the petitioners in this case who were raped, murdered and tortured by off-duty servicemen whom the government knew to have dangerous propensities cannot recover for the government's negligence, directly conflicts with decisions from two other Circuits and its own prior opinion considering the same issue.

Considering almost identical facts the Third and Fifth Circuits have held that injured parties may sue the government for negligent failure to control an employee with known dangerous propensities to prevent that employee from inflicting foreseeable harms. The only Court of Appeals position in support of the Tenth Circuit is certain dicta from the Second Circuit.

In *Gibson v. United States*, 457 F. 2d 1391 (3rd Cir. 1972) a Job Corps enrollee who was a juvenile delinquent with a known addiction to narcotics assaulted

the plaintiff who was an instructor at the Job Corps Center. The district court granted the government's motion to dismiss under the provisions of 28 U.S.C. § 2680(h) holding that the claim arose out of an assault and battery.

The Third Circuit reversed holding that whether the claim was based upon assault and battery, and thus, barred by § 2680(h), or on the antecedent negligence of the government was a simple question of tort law. That is, the court held that if the subsequent assaults were foreseeable they were "*not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injury.*" 457 F. 2d. at 1395. (Emphasis in original.) The tort asserted thus was one of negligence and not barred by § 2680(h). Foreseeability was properly alleged in the instant case.

The Third Circuit also considered the employee/non-employee distinction advocated by the United States (and found persuasive by the Tenth Circuit below). The Third Circut found the employee/non-employee distinction persuasive in *exactly* the opposite fashion from the Tenth Circuit. The court held "[i]n the case *sub judice*, the duty to control the conduct of the trainees is even stronger since they were allegedly employees of the United States at the time and definitely under its control." 457 F. 2d at 1394.[2]

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[2] **The Tenth Circuit attempts to distinguish Gibson saying "[l]iability was disallowed and there was specific mention of the fact that the assailant was not an employee, that he was a third person." 611 F. 2d at 1355 fn. 4, Appendix p. A12. Given the language of Gibson quoted above, and the Third Circuit's direct finding that "[the assailant] was a Job Corps enrollee**

In *Gibson* the Third Circuit discussed the earlier case of *Collins v. United States*, 259 F. Supp. 363 (E.D.Pa. 1966) relied on by the courts below. The court gave *Collins* short shrift confining it to its facts and noting that the only basis for the alleged government knowledge of the assailants dangerous propensities in *Collins* was the very assault for which the action was brought. In the instant case, as in *Gibson I*, the allegations of governmental knowledge and duty to control are substantial and predate the assaults. Thus, the decision in *Gibson I* is diametrically opposed to the decision reached by the Tenth Circuit below. Further, the Tenth Circuit's reliance on *Collins* is ill-founded when one notes that the Eastern District of Pennsylvania is within the Third Circuit.[3]

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[2] **Continued**

employed and housed by the United States . . . .", 457 F.2d at 1393, it is difficult to understand this distinction. The district court even admitted that **Gibson** squarely contradicted its holding. 469 F. Supp. at 423; Appendix p. A-17.

The petitioners submit that the Tenth Circuit has confused the opinion in **Gibson v. United States**, 457 F. 2d 1391 (3rd Cir. 1972), with the Third Circuit's subsequent opinion on appeal following remand. **Gibson v. United States**, 567 F. 2d 1237 (3rd Cir. 1977) cert. denied 436 U.S. 925 (1978). (Referred to as **Gibson II.**) After the district court decided **Gibson** on remand this Court issued its decision in **United States v. Orleans**, 425 U.S. 807 (1976). In light of **Orleans**, the Third Circuit held in **Gibson II** that the managing authority of the Job Corps Center with the responsibility for supervising the trainees, was an independent contractor and thus the United States could not be held liable. The holding in **Gibson II** does nothing to undermine the clear holding in **Gibson I** that the United States may be held liable for its negligent failure to control persons with known dangerous propensities.

[3] The District Court for the Eastern District of Pennsylvania recently decided **Bryson v. United States**, 463 F. Supp. 908 (E.D.Pa. 1978) following **Gibson** and directly contrary to **Collins** and the Tenth Circuit below.

In *Underwood v. United States*, 356 F. 2d 92 (5th Cir. 1966) the plaintiff alleged that the Government had negligenty released a mentally ill airman from a hospital allowing him to return to duty where he gained access to a pistol and killed his wife. After trial the district court found that the actions of the medical officers in releasing the assailant were not negligent and not a causal connection of the subsequent death. The Fifth Circuit reversed and remanded holding that negligence and proximate cause had been proven at trial.

The court held *inter alia* that the government could not raise 28 U.S.C. § 2680(h) on remand. The court relied on *Muniz v. United States*, 305 F. 2d 285 (2d Cir. 1962) aff'd *sub nom United States v. Muniz*, 374 U.S. 150 (1963). *Muniz* in turn relied entirely on *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954). The Fifth Circuit interpreted *Muniz* and *Panella* as holding that governmental employment status of the assailant was irrelevant when the complaint alleged an antecedent negligent failure to control. The holding in *Underwood* is thus directly contrary to the holding in the instant case.

One year earlier the Fifth Circuit had considered an analogous fact situation in *United States v. Shively*, 345 F. 2d 294 (5th Cir. 1965) cert. denied 382 U.S. 883 (1965). In *Shively*, the court held that the negligent issuance of a firearm to an Army Sergeant in violation of regulations was not the proximate cause of the plaintiff's injury. The court held *inter alia* that the claim would also have been barred by 28 U.S.C. § 2680(h)

as one arising out of assault and battery. 345 F. 2d at 297. In *Underwood*, one year later and with Chief Judge Tuttle sitting in both cases, the Fifth Circuit repudiated its statement in *Shvely* concerning § 2680(h). Careful reading of *Shively* and *Underwood* shows that the *correct* distinction between the cases was the allegation of foreseeability of harm. In *Shively*, the allegation was missing and the court held that the tort law of Georgia would not recognize a duty in the government absent such an allegation. In *Underwood* and the instant case such allegations of foreseeability are present.[4]

The Fifth Circuit's position has remained constant since its decision in *Fair v. United States*, 234 F. 2d 288 (5th Cir. 1956). In *Fair*, an Air Force Captain had threatened to kill a woman and these threats were known to military authorities. The captain was ordered to report to a hospital for a psychiatric examination and the woman was promised that she would be notified before the captain was released. Following a cursory psychiatric examination the captain was released without warning the woman. Upon release he killed her and two hospital security guards. The district court dismissed the claim based on 28 U.S.C. § 2680(a) finding that the actions of the Government had been "discretionary". The Fifth Circuit reversed and remanded based on this Court's decision in *Indian Towing Company v. United States*, 350 U.S. 61 (1955). No attention whatsoever was paid to the governmental employ-

[4] It is indicative of the split in the Circuits that the courts below relied upon **Pennington v. United States**, 406 F. Supp. 850 (E.D.N.Y. 1976), a District Court case in the Second Circuit proporting to interpret two cases from the Fifth Circuit.

ment status though § 2680(h) was an issue effecting subject matter jurisdiction. Thus, the court found liability even though the assailant was employed by the government as a member of the Armed Forces. This holding directly conflicts with the Tenth Circuit.[5]

The Tenth Circuit's own position on liability for negligent failure to control is not consistent. In *Sanchez v. United States*, 506 F. 2d 702 (10th Cir. 1974), citing *Fair* with approval, the court held "if one has charge of a person who has dangerous propensities he must exercise reasonable care to control the third person in order to protect the public." 506 F. 2d at 705. The Tenth Circuit thus joined the Third and Fifth Circuits recognizing liability for negligent failure to control irrespective of the employee/non-employee distinction it attempts to introduce in the instant case. As show above, the purported distinction conflicts with the other Circuits which have directly considered the issue.

Though petitioners cited and relied on *Sanchez* in both their principal and reply briefs to the Tenth Circuit and the United States attempted to rebut *Sanchez* in its brief, the court below found no need to even men-

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[5] The Tenth Circuit attempts to distinguish **Fair** as being decided on hospital-patient grounds. 611 F. 2d at 1355 fn. 3, Appendix p. A12. This attempted distinction is illusory when one recognizes the procedural posture in which the instant case reaches this Court. The Fifth Circuit used the hospital-patient relationship to establish a knowledge of the assailant's dangerous propensities and a duty and opportunity to control his actions. In the instant case, the petitioners alleged a similar knowledge, duty and opportunity of control. Since this case was decided on summary judgment these allegations must be taken as true and the Tenth Circuit's perceived distinction vanishes.

tion its prior conflicting decision. It is especially interesting to note that Judge Doyle wrote the opinion in both *Sanchez* and the instant case.[6]

The principal case supporting the Tenth Circuit is *Panella v. United States*, 216 F. 2d 622 (2d Cir. 1954). Panella was an inmate at a Federal drug rehabilitation institution and was assaulted by another inmate. Panella alleged that the government was negligent in failing to control the other inmates. The government was granted summary judgment on § 2680(h) as a "claim arising out of assault". The Second Circuit reversed, holding that § 2680(h) did not bar the negligence action against the government.

The court apparently reasoned that if the intentional assault was committed by a government employee the victim claim against the government would be on a *respondeat superior* theory and barred by § 2680(h). In which case, the negligence allegations were merely an attempt to find an alternative form of remedy not barred. Since there was no possible *respondeat superior* liability from a non-employee the court reasoned that the negigence action was the sole remedy and thus not barred by § 2680(h). (See Point II, *infra*, for discussion of the policy questions involved.)

This Court considered an issue related to *Panella* in *United States v. Muniz*, 374 U.S. 150 (1960). One of the petitioners in *Muniz* (the case was a consolida-

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[6] No petition for rehearing was filed in this case because the Practitioners Guide published by the Tenth Circuit indicates that such an action is a futile waste of time.

tion of two actions) was a prisoner in a Federal correctional institution who, when a fight broke out, was beaten by other inmates. Muniz alleged that the government was negligent in failing to prevent the assaults. The government argued that there was either an expressed or implied exemption under the Federal Tort Claims Act for prisoner lawsuits. The body of this Court's opinion in *Muniz* is concerned with this point but at the end, the Court cites § 2680(h) for the basic proposition that the government is not liable for the intentional torts of its employees, 374 U.S. at 163. Nowhere in *Muniz* did this Court consider the liability of the government for the negligence of its employees which results in subsequent attacks by other government employees.

One of the grounds for granting certiorari, Supreme Court Rule 19, is that there be a direct split in the Circuits. On the issue in the present case, the position taken by the Tenth Circuit below directly contradicts that taken in almost identical cases by the Third and Fifth Circuits. The holding below also contradicts an earlier Tenth Circuit opinion and is supported only by a 1956 case in the Second Circuit. The petitioners submit that this Court should grant certiorari in the instant case to resolve the conflict between the Circuits.

## II

## THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE POLICY OF THE FEDERAL TORT CLAIMS ACT

The purpose of the Federal Tort Claims Act, 28

U.S.C. § § 1346, 2671 *et seq.*, is to provide a process of recovery for tortious actions of the government. § 2674 provides "that the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." In contrast to the general rule of strict construction concerning waivers of governmental immunity, this Court has repeatedly held that the Federal Tort Claims Act is to be liberally and equitably construed to further the Congressional intent. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951) and *United States v. Aetna Casualty & Surety Co.*, 388 U.S. 366 (1949). In *United States v. Muniz*, 374 U.S. 150, 159 (1955), this Court went even further and held that "the government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their empoyees. The Federal Tort Claims Act extends to novel and unprecedented forms of liability as well." (Citations omitted.)

With these considerations in mind, the petitioners submit that the decision of the Tenth Circuit below conflicts with the policies inherent in the Federal Tort Claims Act as interpreted by this Court. The mandate of the Federal Tort Claims Act is that the government will be liable for its negligence under the same circumstances as would a private individual. The law in the various jurisdictions of the United States is that a private individual, who knows of a third persons dangerous propensities and has the duty and opportunity to control that person, is liable for his negligent failure to

control when the third person inflicts foreseeable injuries. *Tarasoff v. Regents of the University of California,* 529 P.2d 553 (Cal. 1974); *Sanchez v. United States,* 506 F. 2d 702 (10th Cir. 1974); *Fair v. United States,* 234 F.2d 288 (5th Cir. 1956). See also, *Restatement, Second, Torts* § 319.

In actions alleging a negligent breech of the duty to control, no discussion of the employment relationship between the assailant and the party with the duty to control is proper. The Tenth Circuit's employee/non-employee distinction attempts to introduce into the Federal Tort Claims Act an issue unknown to the private tort law duty of control. The Act clearly requires only that the private duty standard be applied. Thus, the only questions which should be involved are the tort law issues of knowledge of dangerous propensities, duty and opportunity of control, proximate causation and injury.

The problem in the § 2680(h) cases discussed in Point I has been an inability to separate cases where liability was arrested on a "duty of control" theory and the liability of *respondeat superior.* The Tenth Circuit made this confusion evident in its attempt to justify its holding below:

> "In any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributabe to the government. This may well be because of the doctrine of *respondeat superior* or because the employee is closely related to the government. It would appear to be the proximity

> of the employee which gives the government's role its intentional quaity." 611 F. 2d at 1356; Appendix p. A14.

In a *respondeat superior* case, for example in the instant case if the petitioners were suing the government for the assaults of Pierre and Andrews, employment relationships would be important. However, when, as in the instant case, the action is for a negligent breech of a duty to control a third person with known dangerous propensities the employment status of the eventual assailant should be irrelevant. What is relevant is a knowledge of dangerous propensities and a duty of control.

This Court has held that courts should not act as "self-constituted guardian[s] of the treasury [and] import immunity back into a statute designed to limit it." *Indian Towing Company v. United States*, 350 U.S. 61, 69 (1955). Petitioners submit that the casuistries of the employee/non-employee distinction is an attempt to import immunity back into the statute contrary to the policies of Congress. This Court should grant certiorari pursuant to Supreme Court Rule 19 to resolve the conflict between the opinion of the Tenth Circuit and the policies of the Federal Tort Claims Act.

## III

## THE ISSUE IS ONE OF IMPORTANCE REQUIRING THIS COURT'S DECISION

The policy question posed by this petition is what the responsibility of the United States should be under

the Federal Tort Claims Act when it knows that employees under its control have dangerous propensities and will foreseeably inflict injury on the public. The Tenth Circuit has held that the government is *never* liable for its negligent failure to supervise its employees to prevent their foreseeable intentional torts. Every other Circuit which has directly considered this issue has held to the contrary (See Point I, *supra*) and the holding of the Tenth Circuit is contrary to the policy of Congress in enacting the Federal Tort Claims Act. (See Point II, *supra*).

There are approximately two million one hundred thousand men and women serving in the Armed Forces of the United States. In addition, the Department of Defense hires approximately nine hundred and eighty thousand civilian workers. The other agencies of the various branches of the government account for another one million nine hundred thousand employees. *1979 Statistical Abstract of the United States.* This represents approximately five percent of all people employed in the United States.

The Tenth Circuit's interpretation of § 2680(h) gives the government carte blanche to ignore the dangerous propensities for harmful and intentional acts by persons under its control. As in the instant case, servicemen with known psychopathic homicidal tendencies will be allowed to roam free across the country unrestrained because the government is insulated from all resulting liability. Should the other result apply, as in the Third and Fifth Circuits, the magnitude of the potential governmental liability is obvious.

With such divergent positions being taken by the Circuits, and the dimensions of the consequences of different rulings, the petitioners submit that the issue in the present case is of such importance that it requires resolution by this Court and, under Supreme Court Rule 19, a writ of certiorari should be issued.

## IV

## THE CASE WAS NOT DECIDED BELOW ON ADEQUATE INDEPENDENT STATE GROUNDS

In the next to last paragraph of the Tenth Circuit's opinion, 611 F. 2d at 1356, Appendix p. A14, the court purports to find that the egregious and heinous nature of the crimes committed by Pierre and Andrews removes any negligence on the part of the government whatsoever. Apparently this holding is introduced as an independent adequate state law grounds for decision. In that respect, it is both procedurally and substantively wrong.

The question of proximate causation is an issue of tort law and was plead by the petitioners. Since the case was dismissed on a motion for summary judgment it must be taken as true. In addition, the issue has never been contested by the government and was not briefed in this context before the Tenth Circuit.

Moreover, the opinion of the Tenth Circuit on this matter is clearly wrong. The magnitude of horror of the intervening intentional tort is irrelevant to the issue of

proximate cause so long as the harm was foreseeable. See *Gibson v. United States*, 457 F. 2d 1391 (3rd Cir. 1972). See generally *Restatement, Torts, Second* § § 448, 449.

Finally, the instant case is not like *Martinez et al. v. California et al.*, ..... U.S. ..... (Jan. 15, 1980). In *Martinez*, a California statute granted specific immunity for decisions of parole boards in releasing individuals who subsequently injure others. While upholding the statute against various constitutional challenges this Court did nothing to alter the general tort law regarding duty of control.

## CONCLUSION

This Court should grant certiorari to resolve the conflict among the Circuits, to enforce the policy of Congress, to decide an important issue of policy and law and to prevent manifest injustice. The supposed employee/non-employee distinction has been floating around without resolution long enough. This Court should finally resolve the governments responsibility for controlling its employees with known dangerous propensities. The Tenth Circuit states "we are not unmindful or unsympathetic of the innocent plight of the plaintiffs." 611 F.2d at 1356 Appendix p. A14. The petitioners submit that the Congress of the United States, this Court and other courts have also not been blind to the plight of the petitioners and that the Federal Tort Claims Act was passed to provide the petitioners, and others in the same situation, with exactly the remedy sought here.

Respectfully submitted this 31st day of March, 1980.

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Attorneys for the Petitioners

## AFFIDAVIT OF SERVICE

I, C. C. Patterson, a member of the bar of this Court, hereby enter my appearance as counsel of Record for the Petitioners and certify that I affected service on all counsel required under the Rules to be served with copies of this brief by mailing three copies, postage prepaid to Barbara Allen Babcock, Assistant Attorney General, Department of Justice, Washington, D.C. 20530; Robert E. Kopp and Phyllis Jackson Lee, Attorneys, Civil Division, Department of Justice, Washington ,D.C. 20530; Ronald L. Rencher, United States Attorney, U.S. Courthouse, 351 South Main, Salt Lake City, Utah 84103 and, Wade H. McCree, Solicitor General, Department of Justice, Washington, D.C. 20530.

APPENDIX A

# United States Court of Appeals
# Tenth Circuit

Nos. 79-1237, 79-1238, 79-1239,
79-1240, 79-1241

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BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER, JR.; and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased.

*Plaintiffs-Appellants,*

v.

THE UNITED STATES OF AMERICA

*Defendant-Appellee.*

Appeal from the United States District Court for the District of Utah, Central Division
(D.C. Nos. NC-78-0032, NC-78-0033, NC-78-0034, NC-78-0035, NC-78-0036)

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Submitted on the briefs.

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Before McWILLIAMS, DOYLE and LOGAN, Circuit Judges

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DOYLE, Circuit Judge.

This action was brought by personal representatives of a number of persons who were victims of crimes which were committed by two airmen, Dale S. Pierre and William Andrews, who were assigned to duty at Hill Air Force Base near Ogden, Utah. The case allegedly arose under 28 U.S.C. §§ 1346 and 2671 *et seq.* There are five different lawsuits which have been consolidated for trial and for appeal.

The incidents here occurred on April 22, 1974, when two off-duty airmen entered a privately-owned retail store in Ogden, Utah, and committed a variety of atrocious acts including assaults, rapes, batteries and murders against the plaintiffs and the plaintiffs' decedents. Five persons were shot and three were killed.

The theory of plaintiffs' cases is that the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question in that it was reasonably foreseeable that they would, unless restrained, perpetrate serious injuries. The United States moved to dismiss the actions claiming lack of subject matter jurisdiction under the Federal Tort Claims Act (§ 2680(h)), which excepts the government's waiver of immunity where the liability claim arises from assault and battery.

A further legal argument of the government is that under 28 U.S.C. § 2674, there must have been a legal duty running from the government to the person injured in order to render the government liable in the same manner and to the same extent as a private individual under like circumstances.

Plaintiffs amended their complaint so as to include § 1346(b) as a part of its jurisdictional basis. This section merely says that subject to Chapter 171 of the title, the district court has exclusive jurisdiction of civil actions in claims against the United States for money damages or injury to property or personal injury or death caused by the negligence of any employee of the government while acting within the scope of his office or employment under circumstances where the United States or a private person would be liable to the claimant in accordance with the laws of the place where the act or omission occurred.

The district court granted the defendant's motion to dismiss. This was on the ground that the claim actually arose from assault and battery and was therefore barred by 28 U.S.C. § 2680(h), which is the immunity exception. This provides that the waiver of immunity shall not apply to "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

## THE ISSUES

The first question to be considered is whether the above-described deaths and injuries which resulted from batteries and which are presented on the theory of negligence of the government in failing to protect the public from the viciousness of servicemen can be maintained under the Federal Tort Claims Act notwithstanding that intentional torts are within the immunity retained in § 2680(h).

A second question arises only if we hold that there existed a duty on the part of the United States to protect the persons who were killed from the injuries which were suffered. This remaining question would be whether Utah recognizes a cause of action in negligence where criminal acts of third persons intervened.

## THE TRIAL COURT'S DECISION

The trial court rested its judgment of dismissal on the principle that a distinction is to be drawn between assaults committed by government employees and assaults which were committed by non-government employees. Section 2680(h), the court said, has been construed to apply and to bar suits against the United States which were based on intentional wrongs committed by employees notwithstanding that the alleged liability is said by the plaintiff to rest on the negligence of government officials charged with the duty of supervision or control of the employees who committed the assault. The court cited Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976), and Panella v. United States, 216 F.2d 622 (2d Cir. 1954). The courts take a different view as to the applicability of § 2680(h) when the intentional wrongs are committed by non-government employees where there has existed a governmental duty to supervise and control. The court cited Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), *aff'd* 374 U.S. 150 (1963).

The court noted that although the plaintiffs' claims sounded in negligence,[1] they were barred because their

[1] In which immunity is waived in the Tort Claims Act.

true nature and character was that of intentional torts. Negligence, the court continued, was invoked merely to avoid § 2680(h), *supra*. The court was reluctant to recognize this negligence theory as a matter of policy because to do so would destroy the effectiveness of § 2680(h) where intentional torts were committed by employees of the government. Under this analysis, sovereign immunity is waived notwithstanding § 2680 (h), *supra*, in situations such as where federal prison employees negligently fail to supervise or control prisoners or hospital employees fail to supervise patients as a result of which an assault and battery or other intentional tort is perpetrated by the uncontrolled patient or prisoner.

The trial court embraced the employee as opposed to the non-employee distinction. It stated:

> The sole basis for imposing liability on the government is the fact that two government employees committed *intentional* wrongs against plaintiffs and their decedents. Thus, this is unlike the case in which the government is sued for failure to adequately supervise non-employees. There the sole basis for liability is the negligence of the government officials charged with the duty of supervision. In such a case, negligence is not merely an alternative theory of liability; it is the only basis upon which the government can be held responsible. The intentional wrong cannot itself be the basis of liability because that act was not committed by a government official. Here, in contrast, government liability is possible only because government employees committed the intentional act. Thus, although plaintiffs' complaint is drawn in terms of negligence,

> the essence of the cause of action is an assault and battery committed by two individuals who were government employees at the time of the wrongful acts. The claim arises *only* because of the *intentional wrong* committed by employees of the sovereign and is, therefore, a claim "arising out of" an assault and battery and is within the scope of §2680(h). Plaintiff's negligence theory is, in this case, merely an alternate theory of liability. Panella v .United States, 216 F.2d 622 (2d Cir. 1954); Pennington v. United States, 406 F. Supp. 850 (E.D.N.Y. 1976); Collins v. United States, 259 F. Supp. 363 (E.D.Pa. 1966). (Emphasis in original)

***DOES 28 U.S.C. § 2680(h) BAR THE PRESENT ACTION?***

We are constrained to hold that it does. The leading case on the applicability of 28 U.S.C. §2680(h) is Panella v. United States, 216 F.2d 622 (2d Cir. 1954). The author of the opinion in *Panella* was Judge John Marshall Harlan. The district court for the Eastern District of New York had granted the government's motion for summary judgment. It had done so on the ground that the action involved a claim arising out of assault which was held to have been barred under § 2680(h) of the Tort Claims Act. The trial court had determined that § 2680(h) embraced assaults by persons not employed by the government as well as those committed by government employees. The part of the district court's decision holding that the non-waiver of immunity contained in § 2680(h) applied to non-government employees was reversed and the court in effect held that in the non-employee case § 2680(h) did not

preclude recovery. The plaintiff in this case had been sentenced for a drug offense, but upon his election to undertake treatment he was sent to the Public Health Service Hospital in Lexington, Kentucky, a government institution. While there he was assaulted by another inmate. He sued the United States under the Federal Tort Claims Act contending that the assault was caused by the negligence of employees of the United States in failing to provide adequate guards and by neglecting to properly supervise those confined in the institution. The Second Circuit holding was that a claim sounding in negligence could be prosecuted against the United States where, as in *Panella*, the assailant was not an employee of the government. The court said that if § 2680(h) was to be read literally, it would apply to assaults committed by persons other than government employees, but that such a reading was out of harmony with the rest of the act. "For in the present case the only basis of liability against the Government is the negligence of its employees, not their deliberate torts, * * * It is therefore important to distinguish cases in which it was sought to hold the Government liable on a negligence theory for assaults committed by *government employees.*" 216 F.2d at 624.

The distinction made by the Second Circuit in *Panella* as to the § 2680(h) exclusion in employee cases and the non-applicability of § 2680 to non-employee cases has been adopted in most of the subsequent decisions. *See, for example,* Pennington v. United States, *supra*, and Collins v. United States, 259 F. Supp. 363 (E.D.Pa. 1966).

In Pennington v. United States, *supra*, a widow brought an action for injuries inflicted on her husband by a deputy United States marshal, who shot him. The marshal at the time of the shooting had been intoxicated. The negligence allegation was the government's allowing the assailant to carry a gun. The court relied on *Panella, supra*, and said that "It is by now well settled that where negligent performance of duties owed by the government to certain individuals makes possible assaults on those individuals by *non-employees* of the government, § 2680(h) will not bar a negligence claim against the government * * * On the other hand, it seems that where the claim against the government is based on alleged inadequate training or negligent supervision of an *on-duty government employee*, which allows or causes the employee to commit an assault, the language of § 2680(h) is applicable and the claim is barred. Panella v. United States, *supra;* Davidson v. Kane, 337 F. Supp. 922 (E.D. Va. 1972); Collins v. United States, 259 F. Supp. 363 (E.D.Pa. 1966)." 406 F. Supp. at 851. The court then pronounced its ruling that § 2680(h) disallowed suits against the government for inadequate training or negligent supervision of an off-duty government employee.

Some of the decisions denying liability tend to give emphasis to the legal causation issue rather than the question of employment relationship. *See, for example*, United States v. Shively, 345 F.2d 294 (5th Cir. 1695), *cert. denied*, 382 U.S. 883 (1965).

A contemporaneous case from the Fifth Circuit, Underwood v. United States, 356 F.2d 92 (5th Cir.

1956), added another element, that of the off-duty factor in a case in which the assailant was a serviceman who killed his wife soon after he had been released from a psychiatric clinic. The suit sought to hold the government responsible because of premature release. The court determined that the government was liable. It emphasized the patient-hospital relationship and used the off-duty element in order to avoid the employee impediment. The district court for the Eastern District of New York in *Pennington, supra,* criticized this reasoning.[2]

In Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), *aff'd,* 374 U.S. 150 (1963), the plaintiff alleged that while he was confined in a federal prison, he was

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[2] This criticism analyzes the lack of logic in distinguishing between an on-duty and an off-duty government employee in the context of the §2680(h) immunity provision:

> We believe that the opinion of the Court in **Shively** states the correct rule. We assume, as we must, the validity of the holdings that an action against the government for negligence in permitting an assault by a non-employee is not one "arising out of assault", but that an action for permitting an assault by an on-duty employee is one "arising out of assault." And we note that the distinction which we might draw between a non-employee and an off-duty employee is not entirely a satisfactory one. But less satisfactory is the distinction plaintiff asks us to draw between on-duty and off-duty employees. We cannot believe Congress meant to bar suits arising out of assaults only by on-duty employees when it exempted claims "arising out of assault" from those covered by the Tort Claims Act. The government's alleged duty not to hire defendant Miller was in no way dependent upon his on-duty or off-duty status. The duties of the government to train Mr. Miller likewise did not vary with his arrival and departure from his place of employment. The alleged obligation to prevent Mr. Miller's access to firearms applied whether or not he was at any given moment actually working for the United States. In short, the government is charged with negligence in

set upon and beaten by 12 fellow inmates. The complaint alleged that the government's negligence consisted of failure to maintain proper guards or segregation of dangerous persons. The Second Circuit reversed the district court's order of dismissal and held that there was a claim stated. In regard to immunity the court said:

> Nor does this case fall within the exemption of 28 U.S.C. §2680(h), barring claims "arising out of assault." That exception applies only to assaults by government agents, not to assaults by third parties which the government negligently fails to prevent. Panella v. United States, 216 F.2d 622 (2d Cir. 1954).

305 F.2d at 287.

The United States relies, in addition, on the case of United States v. Shively, 345 F.2d 294 (5th Cir. 1965), *cert. denied*, 382 U.S. 883 (1965). There the plaintiff sued under the Tort Claims Act alleging negligence of the United States in allowing her husband, a sergeant in the military, to have access to government weapons in violation of regulations and despite knowledge of his unstable condition and dangerous propensities. The *Shively* court said that the government's

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[2] **Continued**

> **hiring Mr. Miller, and in allowing him to be armed. Any duty of the government to screen prospective employees involves actions with no connection to the employee's work schedule or duty status. Thus while it may be significant in a respondent superior case to determine the duty status of the tortfeasor, it is not significant to do so when negligence in hiring or training is the gist of the complaint.**

**406 F. Supp. at 852.**

negligence in issuing the gun was not the cause of the plaintiff's injuries since it was not reasonably foreseeable that he would use the weapon to assault his former wife. On the immunity question the court said:

> From what has already been noted of the facts of this case we also conclude that appellee's claim here is a claim "arising out of assault", which is, in those words, specifically excepted from recovery under the Federal Tort Claims Act, 28 U.S.C. §2680(h). It is not necessary to the ruling here, and we do not determine whether every assault intervening between a show of negligence of the United States and injury to third parties is barred under the Federal Tort Claims Act by this exclusionary language.

345 F.2d at 297.

*Shively* thus went off on the basis that the statute, 28 U.S.C. § 2680(h), precluded the recovery because the injury arose out of an assault and that there was not sufficient showing of negligence based upon foreseeability of harm.

Some of the cases such as *Shively* do not squarely address the issue of applicability of § 2680(h) where the assailant was an employee. Most of the cases, however, including the leading opinion of Judge Harlan in *Panella*, hold that the non-waiver of immunity contained in § 2680(h) is applicable where the intentional tort is committed by an employee. Thus, whether it is explicitly mentioned or not, effect is given to the employee distinction. It is believed that it stems from the proposition that where the employee has committed a tortious intentional act, even though it is not with the

approval of his employer, the government, nevertheless, he is so closely connected with the government that the intentional act is imputed to the government. Since the government has waived liability only in negligence cases and has retained its immunity in intentional tort cases in accordance with § 2680(h), an attempt to establish liability on a negligence basis is indeed an effort to circumvent the retention of immunity provided in § 2680(h).

Plaintiff here maintains that where the suit is in negligence the court should not go behind it and make a distinction as to whether the tortfeasor is an employee. He cites Fair v. United States, 234 F.2d 288 (5th Cir. 1956),[3] Gibson v. United States, 457 F.2d 1391 (3rd Cir. 1972),[4] and Hicks v. United States, 511 F.2d 407

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[3] In **Fair**, the tortfeasor was in the service. He was an Air Force captain with known homicidal tendencies. Also, he was a patient in a government psychiatric hospital. He shot and killed a student nurse whom he had previously threatened. The action against the government claimed that he had been released from the hospital with knowledge of his propensities. The determination was that the government could not escape liability under the exercise of discretion exemption contained in §2680(a). This is a case which departs from the employee standard. The only factual difference is that the assailant was, in addition to being an employee, a patient of a mental hospital. The hospital had full knowledge of his propensities. It was this latter status which was stressed in holding that the hospital was liable. Because of this factual difference, the case is not directly supportive of the plaintiff's position here. Because of the hospital-patient relationship and the duty to protect members of the assailant's family and the public generally from his dangerous propensities, it presents a strong case for liability.

[4] In **Gibson**, the assailant was not an employee, he was a Job Corps trainee who committed an assault on an employee of the Job Corps, an instructor. The theory of the plaintiff-employee was that the government had notice that the assailant was an addict and dangerous. Liability was disallowed and there was specific mention of the fact that the assailant was not an employee, that he was a third person.

(D.C. Cir. 1975).[5]

Although *Fair* upheld a claim, it did not address the employee-non-employee issues. In *Gibson*, the assailant was not an employee. *Hicks* was a hospital patient case in which it was alleged that he was negligently released, whereby St. Elizabeths Hospital, a government agent, rendered the United States legally responsible. It does not appear in the facts that the patient was also an employee of the government. None of these decisions lend support to the plaintiffs in the present case.

In summary: The strong thread which runs through most of these cases is that which recognizes the immunity of the government where the assailant is an employee of the government. This is applied regardless of whether the employee is on duty. The district court here considered the fact that Pierre and Andrews were employees to be a compelling reason for holding that § 2680(h), *supra*, applied. The rationale for this appears to be that where the intervening assailant is an employee, the tort with which the government is charged is in fact as well as law an intentional one subject to

[5] In **Hicks**, the plaintiffs were coadministratrices of the estate of one Corinne Morgan. It is alleged that St. Elizabeths Hospital, an agent of the United States, was negligent, as a result of which the decedent was killed by her husband, who had been a patient at St. Elizabeths Hospital. He shot her after he had allegedly been given liberty as a result of the negligence of St. Elizabeths. The assailant husband was mentally incompetent with the knowledge, of course, of St. Elizabeths. The court there said that the hospital owed a duty to the public in carrying out its responsibilities. The assault was directly attributable to his insane condition, and it was held that the hospital was directly responsible for his release and for the act which was caused by his drinking together with his mental condition.

the § 2680(h) provision. There is a dearth of authority which allow an action to be prosecuted against the government under the Tort Claims Act where the intervening assailant was an employee. In any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government. This may well be because of the doctrine of *respondeat superior* or because the employee is closely related to the government. It would appear to be the proximity of the employee which gives the government's role its intentional quality.

Finally, the particular facts of this case lead to the conclusion that the tort which is the basis of the lawsuit was intentional and subject to § 2680(h) because it was, as a matter of law, an intervening force of such great magnitude that it rendered the negligence of the government in failing to control the assailants insignificant in comparison. The character of the act is so predominantly intentional that the negligence as a causal force is virtually nonexistent.

We are not unmindful or unsympathetic to the innocent plight of plaintiffs. However, to hold the United States government legally responsible for the act in view of the immunity from liability based on intentional conduct and considering its lack of moral, legal or factual contribution would not only be invalid, it would constitute gross injustice.

Having weighed the relevant factors, we hold that the trial court's decision was correct. The judgment of the district court is therefore affirmed.

# APPENDIX B

BYRON NAISBITT, Executor of the Estate of Carol Naisbitt, Deceased, Plaintiff,

v.

The UNITED STATES of America, Defendant.

No. NC 78-0032

United States District Court, D. Utah, N. D.

Jan. 2, 1979

## ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

ALDON J. ANDERSON, Chief Judge.

This action arises out of a series of rapes and murders committed by off-duty United States servicemen while stationed at Hill Air Force Base. Plaintiffs are suing the United States in tort for alleged negligence in failing to adequately evaluate and supervise the servicemen involved. The government has filed a motion to dismiss based on lack of subject matter jurisdiction contending that:

1) plaintiffs' complaint fails to allege a basis for federal court jurisdiction;

2) plaintiffs' complaint is barred by 28 U.S.C. § 2680(h) which excepts from the Federal Tort Claims Act claims arising out of an assault or battery;

3) plaintiffs' claim does not meet the requirements of 28 U.S.C. § 2674 because it does not set forth a duty owed by the government that would be owed "in the same manner and to the same extent [by] a private individual under like circumstances."

Because the court finds that the action is barred by 28 U.S.C. § 2680(h) it is not necessary to rule on the government's other contentions.

Section 2680(h) sets forth exceptions to the general waiver of sovereign immunity contained in the Federal Tort Claims Act. Among other things, the statute prohibits suits against the United States on any claim arising out of the commission of an intentional tort, including assault and battery. The application of this section has not always been consistent (compare *Gibson v. United States* 457 F.2d 1391 (3d Cir. 1972) with *Collins v. United States*, 259 F.Supp. 363 (E.D. Pa. 1966)), but it seems fairly well settled that § 2680(h) does not apply to intentional torts committed by those who are not government employees but who are under government supervision, but does apply to intentional wrongs committed by those who are employed by the government. *Pennington v. United States*, 406 F.Supp. 850 (EDNY 1976); *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954). The question presented for decision here is whether or not, even though the plaintiffs' complaint is drawn in terms of negligence, the action still arises out of an assault and battery so as to fall within the scope of § 2680(h). As stated in *Nichols v. United States*, 236 F.Supp. 260 (N.D. Miss. 1964):

> [T]he applicability of . . . 28 U.S.C. § 2680(h) cannot turn on the artistry of the pleader. The test is not the theory upon which the plaintiff elects to proceed or how artfully the pleadings may have been drawn. Rather, the decisive factor is whether, in substance and essence, the claim arises out of an assault and battery.

Id. at 263.

It is true that not all the courts faced with this question have agreed on the scope of the § 2680(h) exception. See *Gibson v. United States*, 457 F.2d 1391 (3rd Cir. 1972); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966). However, the weight of authority and the better view supports the government's contention that the plaintiffs' claim is barred by sovereign immunity. The sole basis for imposing liability on the government is the fact that two government employees committed intentional wrongs against plaintiffs and their decedents. Thus, this is unlike the case in which the government is sued for failure to adequately supervise non-employees. There the sole basis for liability is the negligence of the government officials charged with the duty of supervision. In such a case, negligence is not merely an alternative theory of liability; it is the only basis upon which the government can be held responsible. The intentional wrong cannot itself be the basis of liability because that act was not committed by a government official. Here, in contrast, government liability is possible only because government employees committed the intentional act. Thus, although plaintiffs' complaint is drawn in terms of negligence, the essence of the cause of action is an assault and battery commit-

ted by two individuals who were government employees at the time of the wrongful acts. The claim arises *only* because of the *intentional wrong* committed by *employees* of the sovereign and is, therefore, a claim "arising out of" an assault and battery and is within the scope of § 2680(h). Plaintiffs' negligence theory is, in this case, merely an alternative theory of liability. *Panella v. United States, supra*; *Pennington v. United States, supra*; *Collins v. United States, supra.*

Waivers of sovereign immunity are to be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). To allow plaintiffs' claim would be to greatly expand the waiver of immunity provided for in the Federal Tort Claims Act. The legislative history of § 2680(h), meager though it is, indicates that Congress sought to protect the United States from suits resulting from the intentional torts of its employees. See *Panella v. United States, supra* at 625-26. However, if plaintiffs' theory were upheld the government would be subject to suit for its employees' intentional wrongs on the theory that the government had negligently failed to control the offending employee. Such a theory would greatly dilute, if not destroy, the protection afforded by § 2680.

The case of *Muniz v. United States*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) is not to the contrary. There the Supreme Court addressed only the question of the right of a federal prisoner to sue under the Tort Claims Act. It did not rule on the scope of § 2680(h). However, in dicta, the Court indicated that

§ 2680(h) would provide a valid defense in a case such as this. *Id.* at 163, 83 S.Ct. 1850.

The plaintiffs contend that the issue of the court's jurisdiction cannot be resolved without a trial on the merits and cite the case of *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). While the court agrees that, in the appropriate case, it has jurisdiction to examine the merits of an action to determine the existence of subject matter jurisdiction, the court does not find this to be an appropriate case. The commission of the assault and battery and the fact that the commission of that wrong gives rise to plaintiffs' complaint is undisputed. The applicability of § 2680(h) is a threshold question in a suit such as this and can be determined by the court as a matter of law. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' complaint be dismissed with prejudice.

## APPENDIX C

STATE of Utah, Plaintiff and Respondent,

v.

Dale S. PIERRE, Defendant and Appellant.

No. 13903

Supreme Court of Utah

Nov. 25, 1977

(Certain footnotes omitted.)

Affirmed and remanded.

Ellett, C. J., and Crockett, J., concurred and filed opinions.

Maughan, J., concurred in part and dissented in part and filed opinion.

WILKINS, Justice:

The Defendant Dale S. Pierre was charged with three counts of murder in the first degree (a capital offense) in violation of Utah Code Annotated, 1953, Section 76-5-202, as enacted 1973, for the murders of Carol Naisbitt ,Michelle Ansley, and Stanley Walker: additionally he was charged with two counts of aggravated robbery in violation of Utah Code Annotated, 1953, Section 76-6-302, as enacted 1973, for the robbery of Orren W. Walker, Jr. and Stanley Walker. The acts forming the bases of these crimes occurred at the Hi-Fi

Shop, a business selling stereo and allied equipment, located in Ogden, Weber County, Utah, on April 22, 1974 during the robbery thereof. All statutory references herein refer to Utah Code Annotated, 1953, as enacted in 1973, Title 76, Utah Criminal Code unless otherwise indicated.

The defendant was tried jointly with William Andrews and Keith Roberts (who were charged with the same five counts as defendant and who are the subjects of companion cases decided this date) before a jury in the District Court of Davis County, State of Utah, and the defendant was found guilty on all five counts on November 15, 1974 (the trial having commenced on October 15, 1974). On November 20, 1974, after a hearing to determine sentences on the murder convictions, this same jury returned a unanimous verdict of the death penalty against the defendant on each of the murder counts. The District Judge then on November 27, 1974, sentenced the defendant to death by shooting at the Utah State Prison on all counts of first degree murder, and he also sentenced the defendant to an indeterminate term of five years to life at said prison on the two counts of aggravated robbery.

The evidence at the guilt or innocence stage of the trial (herein "guilt phase") established that the defendant, Andrews, and Roberts were airmen stationed Hill Air Force Base, Utah. Stanley Walker, Michelle Ansley, Carol Naisbitt, Cortney Naisbitt (son of Carol Naisbitt), and Orren W. Walker, Jr. (father of Stanley Walker) were tied up, made to lie on the floor, and

forced to drink liquid Drano on the evening of April 22, 1974, in the basement of the Hi-Fi Shop in Ogden, Utah, by the defendant in company with Andrews, who aided the defendant by pouring the caustic substance into a plastic cup for accomplishment of these violent acts. The defendant and Andrews both had hand guns and defendant finally shot all of the victims in the head with either a .25 caliber or .38 caliber handgun, which caused the deaths, within a brief period of time during that April evening, of Stanley Walker, Michelle Ansley (who had also been raped by the defendant just before he shot her) and Carol Naisbitt. Cortney Naisbitt and Orren W. Walker, Jr., survived but obviously sustained injuries, with Cortney suffering particularly serious ones.

Evidence further established that Orren and Stanley Walker were robbed in an aggravated manner of personal property in their possession (equipment from the Hi-Fi Shop being taken from Stanley and a watch and wallet being taken from Orren) on April 22nd at the Hi-Fi Shop by the defendant, Andrews, and Roberts. The defendant and Andrews were identified inside of said shop during the robbery and Roberts was identified walking in front of it.

The evidence at this stage of the proceedings was extensive, there being thereat sixty-six witnesses and more than 300 exhibits of physical evidence. In addition to matters mentioned above, the evidence, in summary, established that Andrews had purchased a blue 1970 Chevrolet van in November, 1973, which was used

in the robbery of the Hi-Fi Shop in the evening in question; that Andrews had stated in February, 1974, that he would like to rob a hi-fi shop and would kill anyone who got in his way; the defendant saw in April, 1974 the movie "Magnum Force" in which someone was murdered by being forced to drink Drano; defendant and Andrews priced stereo items at the Hi-Fi Shop two days before the fatal day of April 22nd; defendant rented a storage unit on April 22, 1974, signing a lease agreement thereon which agreement was discovered in defendant's room after the crimes; the storage unit contained a bottle labeled "Drano" and a plastic cup as well as a large quantity of stereo equipment taken from the Hi-Fi Shop, and fingerprints of defendant and Andrews were on some of this equipment; in the afternoon of April 22nd, defendant and Andrews were identified in the blue Chevrolet van as it was at or near the Hi-Fi Shop and Roberts was driving said vehicle near the shop; wallets, purses, and other personal items of identification belonging to the victims were found next to defendant's barracks as well as Hi-Fi Shop labels in Andrews' room and in a garbage can in the latrine of defendant's barracks; and the .25 caliber pistol used to shoot some of the victims was owed by a roommate of Roberts, who had borrowed it from this roommate shortly before April 22nd.

Orren W. Walker, Jr., an eye witness victim to events inside the Hi-Fi Shop on that April 22nd also testified that Michelle, Cortney, and Stanley pled for their lives before the defendant and Andrews; and after shooting him (Orren), the defendant vehemently kicked

a ball point pen into one of his ears and attempted to strangle him with a cord.[5]

At the penalty or sentencing phase of the trial (herein "penalty phase") which took place before the same jury as heard and participated in the guilt phase, the defendant and Andrews were parties thereto but Roberts was not as he had not been convicted of a capital offense. Defendant did not give testimony at this latter phase though Andrews did.

The State presented as witnesses a psychiatrist, a clinical psychologist and a United States Air Force Lieutenant; and defendant called a Protestant Chaplain and a criminologist as witnesses.

Evidence about defendant adduced at this phase demonstrated that while in the Air Force, he failed to report to places of duty wrote two bad checks (for nominal amounts), and unlawfully took another's auto. Also, defendant's Commander initiated a separation action from the Air Force against him which was not consummated, on the basis that Pierre was "minimal productive, and a limited potential airman," though that same Commander recommended honorable discharge for him.

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[5] The record movingly establishes a heroic discipline by Orren Walker who, feigning death after the shooting, endured enormous physical and mental torment in silence and immobility. By doing so he was able to survive and relate the events that unfolded in horror before him.